Supreme Court of the United States.

OCTOBER TERM, 1888.

No. 552.

HENRY M. HALE, *et al. Ex'rs., Pl'ffs.,*
Appellants,

vs.

STEPHEN AKERS, *et al., Def'ts.,*
Appellees.

Appellants' Brief on Appellees' Motion to Dismiss the Writ of Error.

HENRY M. HALE AND
GEORGIANA L. SCHELL,
Appellants in person.

Filed ..... *1889.*

..... *Clerk.*

By ..... *Deputy Clerk.*

S. W. Raveley, Printer, 518 Clay St.

Supreme Court of the United States.

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Appellants,

vs.

STEPHEN AKERS, *et al. Def'ts.*,
Appellees.

APPELLANTS' BRIEF ON APPELLEES' MOTION TO DISMISS THE WRIT OF ERROR.

This Court has determined that upon a motion to dismiss the appeal if it appears from the record that a Federal question had been raised and decided adversely to the appellant, the jurisdiction attached, that it would not be dismissed but must be heard upon the merits.

And until it has been determined that the State Court decided erroneously the Federal question, it could go on no further into the re-examination.

Railroad Co. *vs.* Maryland, 20 Wall, 643, at p. 645; citing Murdock *vs.* Memphis, 20 Wall, 591.

That a Federal question was not only raised but also decided, appears by the following: by the complaint claiming ownership in fee and right to the possession, and the following portions of the amended and supplemental answer of the defendants, appellees:

"And the said defendants, for a further and separate "defense, allege, that previous to the 11th day of "October, 1860, and then and ever since, the City of "Sonoma, in the said County of Sonoma, claimed the "said lands as the pueblo lands of the said city, and "which the said city claimed with other lands adversely "to the said Theodore L. Schell, and was then and ever "since has been prosecuting its claims before the Land "Department of the Government of the United States; "and that previous thereto, the said City of Sonoma "conveyed, by deed in writing, to the defendant, "Stephen Akers, together with the lands and premises "for the recovery of which this action was brought; "and by virtue of the said conveyance from the said "City of Sonoma, as aforesaid, the said defendant, "Stephen Akers, was on the said 11th day of October, "1860, in possession of all of said described premises, "and claiming them adversely to the said Schell."

* * * * * *

"And the said defendants and the said City of "Sonoma, then and ever since claimed that the pueblo "extended on the southeast to the Arroyo Seco, and "that the said Arroyo Seco formed the boundary line "between the pueblo lands of the said City of Sonoma

"and the lands of said Schell, whilst the said Schell "then claimed that the Arroyo Seco did not form "the boundary line as aforesaid, but extended beyond "it on the north and included the lands of the said "defendant, Stephen Akers."

* * * * * *

"That on the 31st day of March, 1880, and since "the commencement of this action, the United States "issued and delivered to the said City of Sonoma and "the Trustees thereof, a patent to the land and prem-"ises in plantiffs' complaint described.

"That the said plaintiffs claim the said described "lands by virtue of a patent issued by the United "States to Jacob P. Leese, and known as the Huichica "Patent, and defendants allege that the said patent "does include the said lands and premises, and if it "does the same was made without authority of law.

"That the only authority upon which the Huichica "Patent issued, was by virtue of a decree of the Cir-"cuit Court of the United States, of California, made "and entered on the 24th day of December, 1856, and "that said decree did not authorize the issue of a pat-"ent by the United States for the lands described in "plaintiffs' complaint, or for any lands on west side of "Arroyo Seco, but confined the issuing of such patent "to, and made the Arroyo Seco the boundary thereof, "between the pueblo and said Huichica."

By the findings showing that the title of appellants was under two grants from the Mexican Government

(findings 5th and 6th) and a subsequent patent from the United States findings 8th, 9th, 10th, and 11th.

That defendants claimed title through the pueblo of Sonoma (findings 14th, 15th) and the subsequent issuance of the patent from the United States to the City of Sonoma as successor of the pueblo (findings 16th and 20th,) and that the property in action is covered by both patents, (25th finding) and the conclusion of law: "That defendant, Stephen Akers, is entitled to "the possession of all the lands and premises described "in the complaint."

By the opinion of the Supreme Court of the State of California.

"What was meant by the words 'taking the direc- "tion of the Arroyo Seco?' It seems to us as it did to "the Commissioner of the General Land Office, when "the matter of the conflict was before him, that the "line was to run from the Trancas to the nearest point "on the Arroyo Seco and thence up that creek or "gulch. If this be so, then it is clear that the line, as "run by the surveyor, did not conform to the decree "but took in lands not covered by it.

"It must follow that to the lands so taken in, the "original concession to the pueblo and the patent issued "upon the confirmation thereof, carried the better "right."

The above extracts from the record show that appellants and appellees were claiming under rights and titles acquired from the Mexican Government prior to the

cession of California to the United States, and which were preserved under the treaty of Guadalupe Hidalgo,

9 U. S. Stats. at large, p. 922,

and which is one of the causes enumerated in § 709, U. S. Revised Statutes as sufficient to confer jurisdiction upon this court.

As to what is said regarding the decision of the Supreme Court of the State of California having determined this case upon two points, in only one of which a Federal question was decided, as to the other point we feel confident that the State Supreme Court would not have arrived at the conclusion they did, had it not been for the error in law upon the Federal question.

The Supreme Court of California say:

* * * * * *

"The parties evidently thought that if the city "should finally succeed in establishing its claim, and "receiving a patent for any of the land within the lines "of the Huichica patent, it would have the better title "to the land.

"They could therefore avoid ligitation and expense, "and safely await the issue of the city's contest. As "we have seen they rightly interpreted the law, and "so long as Schell lived he acquiesced in the arrange-"ment. After his death his executors thought it their "duty to raise the question again, and this action was "commenced.

"In our opinion the agreement was intended to be, "and was, binding upon the parties and decisive of

" their rights when it was executed, and it remains so " still."

Thus the Supreme Court of California arrived at its conclusion as to the binding force of the contract between appellants' testator and appellees, upon an erroneous deduction of the law regarding the power of the Commissioner of the General Land Office to curtail and avoid a survey upon which a patent of the United States had already issued.

13 U. S. Stats. at large, 332, Section 2.

It is respectfully submitted that the motion to dismiss be overruled.

HENRY M. HALE AND
GEORGIANA L. SCHELL,
Appellants in person.

Supreme Court U. S.
FILED,
OCT 12 1889
JAMES H. MCKENNEY
CLERK.

Supreme Court of the United States.

OCTOBER TERM, 1889.

No. 270.

HENRY M. HALE and GEORGIANA L. SCHELL, Executors of Theodore L. Schell,

Plaintiffs in Error.

vs.

STEPHEN AKERS and MONTGOMERY AKERS,

Defendants in Error.

IN ERROR TO THE SUPREME COURT OF THE STATE OF CALIFORNIA.

Brief for Plaintiffs in Error.

W. W. COPE,

Attorney for Plaintiffs in Error.

Filed ..... *1889.*

..... *Clerk.*

By ..... *Deputy Clerk.*

S. W. Raveley, Printer, 518 Clay St.

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HENRY M. HALE AND GEORGIANA L. SCHELL, Executors of Theodore L. Schell,

Plaintiffs in Error,

vs.

STEPHEN AKERS and MONTGOMERY AKERS,

Defendants in Error.

BRIEF FOR PLAINTIFFS IN ERROR.

FACTS.

This action was brought by the executors of Theodore L. Schell, deceased, plaintiffs in error against defendants in error, to recover the possession of a piece of land in the County of Sonoma, State of California, included within the boundaries of two conflicting patents issued by the United States to claimants of Mexican titles to land, which had been confirmed under the provisions of an Act of Congress of March 3d, 1851, to ascertain and settle private land claims in the State of California.

One of these patents was issued August 3d, 1859, to Jacob P. Leese for the Huichica Rancho, based upon two grants made by Mexican Governors of California; the one on the 28th day of October, 1841, of the place called Huichica, in the neighborhood of Sonoma embracing all the land between the Arroyo Seco, which was the westerly boundary, the Arroyo de los Carneros and the swamp land containing two square leagues.

The grant was made by the Governor upon the petition of Jacob P. Leese, a part of which was a diseño of the grant prayed for, showing the location of the tract and the boundaries and fixing the Arroyo Seco as the western boundary as far down the stream as where it enters the salt marsh. Judicial possession under this grant was attempted to be given to Leese on February 14th, 1842, but on report to the Governor it was declared by him to be void because judicial possession had been given of a greater quantity of land than that granted.

On June 15th, 1844, said Leese presented a second petition to Governor Micheltorena for the said Rancho Huichica. Among other things in this petition he stated that " as the first diseño presented with his first peti-
" tion was only an eye sketch, there not being any one
" at the time who could make a correct map of the
" land, it therefore had many defects; since although
" it is true that the boundaries as represented on the
" first diseño are such as the rancho should have, yet
" the courses and distances were defective; that the
" land granted to him contains some four square leagues

" as ascertained by measurement and that his grant of " 1841 only conveyed him two and a half square " leagues. He therefore presents a new diseño, made " with all exactitude by which, he says in his petition " that the place instead of containing two square leagues " as set forth in the title, in fact contained some four " square leagues; and prays a new title be issued to " him."

The diseño presented with this second petition included a piece of land on the west side of the Arroyo Seco, lying southeasterly of a line starting at what was then called the "Trancas" on Sonoma Creek, and running in a northeast course to the Arroyo Seco; thence up the Arroyo Seco much further than is represented on the first diseño and grant, and also representing the grant prayed for as adjoining the Pueblo of Sonoma.

This includes the premises in dispute.

Both the first and second diseño were the work of skilled and competent draughtsmen.

On July 16th, 1844, Micheltorena, then Governor, made a second grant of three and a half leagues of the land called "Huichica," bounded on the north by the crossing of the upper road to Napa, on the east by the Arroyo de los Carneros, on the south by the swampy lands on the bay, on the west by Estero de Sonoma as far as the "Trancas," taking the direction of the Arroyo Seco as far as the Little Hills of Huichica.

This grant was made subject to approval by the departmental assembly.

The first grant was approved by the departmental

assembly in September, 1845. The second grant was never placed before said assembly for approval.

On April 6th, 1852, Leese presented a claim for confirmation of his title to the whole Huichica tract of five and a half leagues to the Board of Land Commissioners. His claim was confirmed by said Board, April 18th, 1853, and by the United States District Court, April 22d, 1856. The appeal to the United States Supreme Court was dismissed.

The decree of confirmation contained this clause:

"The land of which confirmation is hereby made is "known by the name of "Huichica," containing "five and one-half square leagues and no more, "and is bounded and described as follows, to-wit: "Bounded on the north by the upper road which goes "to Napa, on the east by the Arroyo de los Carneros, "on the south by the marshy land adjoining the Bay "of San Francisco, and on the west by the Estero of "Sonoma as far as the Trancas, taking the direction of "the Arroyo Seco."

Under this decree a survey was made in December, 1858, which was approved by the United States Surveyor-General for the State of California, June 4th, 1859.

In accordance with said survey a patent issued to Jacob P. Leese for the Huichica Rancho containing 18,704 acres, dated August 3d, 1859, which is in the usual form of patents issued on confirmed Mexican grants. It recites the second grant aforesaid, confirmation by the Courts and said survey. The westerly

boundary, as shown on the plat in the patent, is the Sonoma Creek from a post marked L at the lower landing as far as a post marked L at the Trancas; thence a straight line running north 37 degrees east, 150 chains to a post marked L on the Arroyo Seco, at the Huichica hills, this last line is known as the Trancas line.

By sundry mesne conveyances, Theodore L. Schell, in January, 1859, became vested with the title of said Leese in and to 470 acres of said rancho the same including the property in action. Theodore L. Schell departed this life in the month of December, 1877, leaving a will appointing plaintiffs in error his executors. Letters testamentary were issued to them in January, 1878, and they have ever since been executors of said Schell's estate.

On the 24th of June, 1835, Figueroa, the Mexican Governor of California, instructed General M. G. Vallejo, director of colonization, to establish the Pueblo of Sonoma; and, in pursuance of said instructions, said Vallejo, in the same year, established said pueblo within the present County of Sonoma and made a survey thereof with the following boundaries: "On the east the Arroyo Seco, from the vineyard of Salvador Vallejo to the salt marsh on the bay, thence along the salt marsh westerly to Sonoma Creek; thence up said creek to the Agua Caliente Creek; thence easterly by the hills north of the city to the place of beginning. This tract General Vallejo laid out and platted into lots and blocks and established families on the same, occupying

the tract along the Arroyo Seco in 1835, down to the point where it entered the salt marsh aforesaid.

On May 21st, 1852, the Mayor and Common Council of the City of Sonoma, presented to the Board of Land Commissioners, their claims as successors of the pueblo, for all the land of the Pueblo of Sonoma as established by Vallejo. Their claim was confirmed by said Board January 22d, 1856, an appeal was taken to the United States District Court, pending said appeal the case was transferred under provisions of an Act of Congress, approved July 1st, 1864, to the United States Circuit Court for the Northern District of California, and the claim was confirmed by that Court, November 2d, 1864. These decrees fixed the Arroyo Seco from the vineyard aforesaid to the salt marsh, as the eastern boundary of the pueblo.

The United States Surveyor-General for the State of California in September, 1868, made a survey of said lands and reported the same to the Land Department of the United States for approval on the 14th day of August, 1872. Due and proper notice thereof was given and published in accordance with said Act of Congress of July, 1864, and the matter coming on to be heard before the Commissioner of the General Land Office on March 8th, 1876, that officer adjudged and determined on a conflict arising before him on the approval of said survey as to the location of the south-easterly line, being the boundary common to the said lands confirmed as aforesaid to the City of Sonoma, and the lands known as the "Huichica Grant," that

such boundary should be established as follows: A direct line running from the point marked "Trancas" on Sonoma Creek, to the point where the Arroyo Seco enters the salt marsh (Station No. 43 in the amended survey of Rancho Huichica) and thence following the direction of the Arroyo Seco to the little Huichica hills, should constitute the southeasterly boundary of the Pueblo of Sonoma; and directed the said Surveyor-General to make survey of the said confirmed claim of the said City of Sonoma in accordance with said decision.

In pursuance thereof the Surveyor-General made an amended survey of said lands, due notice thereof being given as prescribed by said Act of Congress, of July 1st, 1864, and amendments thereto, and the said Surveyor-General having on the 5th day of December, 1878, reported to the United States General Land Office all his proceedings in the matter of the re survey as aforesaid, together with the plat of said re-survey, the objections thereto, the testimony produced before him, the argument of counsel and the previous record, upon a hearing had before the Commissioner of the General Land Office upon due published notice thereof on said re-survey and objections made thereto, the said Commissioner approved the said re-survey and the said former decision of the said Commissioner of March, 1876, fixing the Arroyo Seco as the boundary between the said Pueblo of Sonoma and Huichica grant. No appeal was taken from this decision.

On March 31st, 1880, a patent issued to the Mayor

and Common Council of the City of Sonoma in accordance with the decrees of confirmation and survey containing 6,063–95 acres. The plat in the patent shows that it covers 423 acres of land embraced in the Huichica patent, being the tract bounded by the "Trancas line," so called, running from post L at the Trancas, north 37 degrees, east 156 chains to post L on the Arroyo Seco, by the Arroyo Seco from said post to where it enters the marsh at station 43 aforesaid, and by a line from said station, south 70 degrees 45 minutes, west 81.50 chains to post L at the Trancas.

The defendant, Stephen Akers, entered into possession of the land described in plaintiffs' complaint under a contract with the City of Sonoma to purchase the same in 1851, and has occupied the same ever since; that on the 13th day of May, 1858, the said City of Sonoma conveyed to Stephen Akers by deed, 111 acres of land within the limits of said city, as the same was confirmed and patented as aforesaid and the land sued for is a part of the said 111 acres so conveyed to said Stephen Akers, and he has continued to reside upon, cultivate and improve the same and the whole thereof up to October 11th, 1860, and resided upon, cultivated and improved the west part of said tract so conveyed to him, including the portion sued for by plaintiffs, ever since 1851.

On September 12th, 1860, said Theodore Schell being then alive brought suit in the Seventh District Court of this State for the County of Sonoma against the said Akers to recover all of said tract of land, claim-

ing title thereto under the said Huichica patent, and the said Akers, by his answer in said action claimed title and possession to the whole thereof under his deed from the said City of Sonoma and during the pendency of said action and on October 11th, 1860, said Schell and Stephen Akers made an agreement in writing whereby said Akers agreed to release to said Schell the easterly half of said 111 acre tract immediately and that in case the City of Sonoma should not be able to establish her claim to the land beyond and lying to the east of the Huichica patent line, to deliver to him possession of all the remainder of said tract, or such portion thereof as should be within said patent and pay a yearly rent of five dollars per acre to Schell for the land so occupied by him; and Schell agreed that if the City of Sonoma should establish her claim to any portion of the land then released to him that he would deliver to Akers the possession thereof, and pay him a yearly rent of five dollars per acre therefor. (Trans. pp. 4, 5).

Thereupon Akers surrendered to Schell the possession of fifty acres of land as the extreme easterly end of said tract, retaining the possession of fifteen acres lying between the land so surrendered and the Huichica patent line. On October 12th, 1860, said Schell dismissed said action.

On July 28th, 1879, plaintiffs served upon defendants a demand in writing for the surrender of the possession of the land described in the complaint, and defendants thereupon refused to surrender to plaintiffs any portion of said land.

The action was regularly tried in the Superior Court in and for the County of Sonoma, State of California, and its decision and judgment were made and rendered against the plaintiffs and in favor of defendants. From this judgment plaintiffs appealed to the Supreme Court of the State of California. On March 26, 1886, said Court by its final judgment affirmed said judgment of the Court below from which the present writ of error is prosecuted.

THE FEDERAL QUESTION.

That a Federal question was not only raised in the State Supreme Court, but also decided by it adversely to plaintiffs in error, appears by the following:

By the complaint claiming ownership in fee and right to the possession (Trans. pp. 1, 2), and the following portions of the amended and supplemental answer of the defendants.

" And the said defendants, for a further and separate " defense, allege that previous to the 11th day of Octo- " ber, 1860, and then and ever since, the City of Sono- " ma, in the said County of Sonoma, claimed the said " lands as the pueblo lands of the said city, and which " the said city claimed with other lands adversely to " the said Theodore L. Schell, and was then and ever " since has been prosecuting its claims before the Land " Department of the Government of the United States; " and that previous thereto, the said City of Sonoma " conveyed, by deed in writing, to the defendant, " Stephen Akers, together with the lands and premises

"for the recovery of which this action was brought, "and by virtue of the said conveyance from the said "City of Sonoma, as aforesaid, the said defendant, "Stephen Akers, was on the said 11th day of October, "1860, in possession of all of said described premises, "and claiming them adversely to the said Schell." (Trans. p. 3).

* * * * * *

"And the said defendants and the said City of "Sonoma, then and ever since claimed that the pueblo "extended on the southeast to the Arroyo Seco, and "that the said Arroyo Seco formed the boundary line "between the pueblo lands of the said City of Sonoma "and the lands of said Schell, whilst the said Schell "then claimed that the Arroyo Seco did not form the "boundary line as aforesaid, but extended beyond it on "the north and included the lands of the said defend-"ant, Stephen Akers." (Trans. p. 3).

* * * * * *

"That on the 31st day of March, 1880, and since "the commencement of this action, the United States "issued and delivered to the said City of Sonoma and "the trustees thereof, a patent to the land and premises "in plaintiffs' complaint described." (Trans. p. 4).

"That the said plaintiffs claim the said described "lands by virtue of a patent issued by the United "States to Jacob P. Leese, and known as the Huichica "patent, and defendants allege that the said patent "does not include the said lands and premises, and if

" it does, the same was made without authority of law." (Trans. p. 4).

" That the only authority upon which the Huichica " patent was issued, was by virtue of a decree of the " Circuit Court of the United States of California, made " and entered on the 24th day of December, 1856, and " that said decree did not authorize the issue of a pat- " ent by the United States for the lands described in " plaintiffs' complaint, or for any lands on west side of " Arroyo Seco, but confined the issuing of such patent " to, and made the Arroyo Seco the boundary thereof, " between the pueblo and said Huichica." (Trans. p. 4).

By the findings showing that the title of plaintiffs in error was under two grants from the Mexican Government. (Findings 2nd and 6th, Trans. pp. 6, 7), and a subsequent patent from the United States. (Findings 8th, 9th, 10th and 11th Trans. p. 8).

That defendants claimed title through the Pueblo of Sonoma, (findings 14th and 15th, Trans. p. 9) and the subsequent issuance of the patent from the United States to the City of Sonoma as successor of the pueblo (findings 16th and 20th, Trans. pp. 9, 10) and that the property in action is covered by both patents (finding 25th, Trans. p. 12) and the conclusion of law:

" That defendant stephen Akers, is entitled to the " possession of all the lands and premises described in " the complaint." (Trans. p. 12.)

By the opinion of the Supreme Court of the State of California :

"What was meant by the words, 'taking the direc-
" 'tion of the Arroyo Seco?' It seems to us, as it did
" to the Commissioner of the General Land Office when
" the matter of the conflict was before him, that the
" line was to run from the Trancas to the nearest point
" on the Arroyo Seco and thence up that creek or gulch.
" If this be so, then it is clear that the line, as run by
" the surveyor did not conform to the decree, but took
" in lands not covered by it. It must follow that
" to the lands so taken in, the original concession to
" the pueblo and the patent issued upon the confirma-
" tion thereof, carried the better right." (Trans. p. 19.)

The above extracts from the record show that plaintiffs in error and defendants in error were claiming under rights and titles acquired from the Mexican Government prior to the cession of California to the United States, and which were preserved under the treaty of Guadalupe Hidalgo.

9 U. S. Stats. at Large, p. 922,

and which is one of the causes enumerated in §709, U. S. Revised Statutes as sufficient to confer jurisdiction upon this Court.

This Court has determined in the case of *Railroad Company* vs. *Maryland*, 20 Wall, 643, at page 645, that where a Federal question has been raised and has been decided against the plaintiff in error, the jurisdiction has attached and it must be heard on the merits. But until it has been determined that the State Court decided erroneously, the Federal question which it did

decide, they could go no further into the re-examination.

ASSIGNMENT OF ERRORS.

The Supreme Court of the State of California erred in adjudging that a portion of the western boundary of the Huichica Rancho, known as the Trancas line as the same was run by the Surveyor-General of the United States, and as shown on said patent, did not conform to the decree of confirmation of the claim of Leese for said rancho by the United States District Court for the Northern District of Callfornia, made April 22d, 1856.

Said Court erred in adjudging that the patent issued by the United States to the Mayor and Common Council of the City of Sonoma, dated March 31, 1880, established that the title to the land in controversy in this action was in the defendants, and that it gave to defendants a title and right to said land, superior to the title of plaintiffs thereto under the patent issued to Leese, dated August 3, 1859.

Said Court erred in adjudging that plaintiffs' testator, Schell, and the defendant Akers, in executing their written agreement, dated October 11th, 1860, contemplated or intended that in case any patent should be thereafter issued to the City of Sonoma conveying any portion of the land to which Schell then had title under the Huichica patent aforesaid, issued August 3d, 1859, such subsequently issued patent would or could divest said Schell of his title to said land under said Huichica

patent, or could establish the superior title to said land was vested in the City of Sonoma.

POINTS AND AUTHORITIES.

I.

The grant of Huichica, to Jacob P. Leese, was such as to divest the pueblo of all title in that portion thereof in suit.

Notwithstanding that in 1835 a pueblo was located and platted where Sonoma now stands, the title held by the pueblo to its lands was limited, and the lands were not held in absolute property with full right of alienation and disposition, but were subject to the control and disposition of the government until the title passed to private parties.

United States vs. *Hare*, 4 Sawyer 653, at p. 655.

Grisar vs. *McDowell*, 6 Wall., 363.

Townsend vs. *Greeley*, 5 Wall., 326, 336-7.

Hart vs. *Burnett*, 15 Cal., 530.

And the grant by the Governor in 1844 of "Huichica," though it did include a portion of the Pueblo of Sonoma, was a proper exercise of a right and had the effect to vest in the grantee the property therein described.

The description was by metes and bounds, and that the objects therein described were then well known and easily ascertained is apparent from the fact that at the time of the trial of this case in the lower Court they were even then in existence. (Findings 23rd, 25th, Trans. pp. 11, 12.)

The lower Court found that in 1835, General Vallejo under instructions from the Mexican Governor of California established the Pueblo of Sonoma, and made a survey thereof, the easterly boundary of which was the Arroyo Seco " from the vineyard of Salvador Val- " lejo to the salt marsh on the bay " and the southerly line from the Arroyo Seco westerly along the salt marsh to Sonoma Creek, and the westerly line up said creek to the Agua Caliente Creek, " thence easterly by the " hills north of the city to the place of beginning," and laid out and platted this into lots and blocks, " and " established families on same, occupying the tract " along the Arroyo Seco, in 1835, down to the point " where it entered the salt marsh aforesaid."

Findings 14th and 15th Trans. p. 9.

There is no finding that at the date of the grant to Leese in 1844 it was occupied by any one.

At all events, the title of the pueblo to this portion along the Arroyo Seco had not been transferred to any one, for the reason that the Court finds that in 1851 the City of Sonoma made a contract with Stephen Akers to sell 111 acres of this land to him, under which he went into possession, and in 1858 procured a deed from the City of Sonoma, (Finding 20th, Trans. p. 11), which is conclusive, that at the time of the grant to Leese, the government had the power, notwithstanding that a pueblo had been laid out, to dispose of this identical land to third parties.

II.

The fact that this grant to Leese for the three and one-half leagues, was made subject to the approval of the Departmental Assembly, and the Departmental Assembly took no action upon it, does not invalidate the grant; and the subsequent confirmation of the grant by the Board of Land Commissioners under the Act of 1851, and the issuance of the patent thereon, had the effect of vesting in the grantee as of the date of the grant in 1844, all the title which the Mexican Government had; and makes the title under which plaintiffs in error claim, superior to that of the defendant, whose title was not acquired until the year 1851.

Finding 20th, Trans., pp. 10, 11.

The approval of the Departmental Assembly was not an essential requisite to the vesting of an interest in the grantee. Under the Mexican decrees of August 18th, 1824, and November 21st, 1828, it appears that a title passed by the Governor's grant, but its definitive validity was suspended for the approval of the assembly; and so it continued to be suspended until that approval had been given, when the title became perfected. But if that was refused, it did not take away, nor in any way qualify, the grantee's title, but only kept its final validity in suspense until the grant had been rejected by the supreme government of the Republic.

U. S. vs. *Reading*, 18 How., 1.

U. S. vs. *Cervantes*, 18 How., 553.

U. S. vs. *Johnson*, 1 Wall., 326.

III.

There was no power in either the Commissioner of the General Land Office, or in the United States Surveyor General for the State of California, to change the lines of any survey upon which a patent of the United States had already issued.

Under the 13th Section of an Act entitled "An "Act to ascertain and settle the private land claims in "the State of California," approved March 3rd, 1851.

9 U. S. Stats. at Large, 633.

Section 13th contains the following:

* * * * * * *

"The said Surveyor-General shall have the same "power and authority as are conferred on the Register "of the Land Office and receiver of the public moneys "of Louisiana, by the sixth Section of the Act 'to "'create the office of the Surveyor of the public lands "'for the State of Louisiana,' approved third of March, "one thousand eight hundred and thirty one."

9 U. S. Stats. at Large, 633.

And Sec. 6 of that Act provided that where the confirmed claims conflicted, or in any manner interfered with each other, the Register of the Land Office and receiver of public moneys for the proper land district, were authorized to decide between the parties —

"Provided that the decisions and surveys, and the patents which may be issued in conformity thereto, shall not in any wise be considered as precluding a le-

gal investigation and decision by the proper judicial tribunal between the parties to any such interfering claims, but shall only operate as a relinquishment on the part of the United States of all title to the land in question.

4 U. S. Stats. at Large, 494.

Under the Act of July 1st, 1864, entitled "An Act "to expedite the settlement of titles to land in the "State of California."

13 U. S. Stats. at Large, 332.

The authority was not conferred upon him, and by Section 2 of this Act, he was limited to such surveys and plats theretofore made by the Surveyor-General of California *which had not already been approved by one of the District Courts of the United States for California*, or by the Commissioner of the General Land Office.

Leese's claim was confirmed by the Board of Land Commissioners on the 18th of April, 1853, and by the United States District Court, April 22d, 1856, and the appeal to the United States Supreme Court was dismissed December 24th, 1856.

(Finding 8th, Trans. p. 8.)

Under this decree of confirmation a survey was made,

(Finding 10th, Trans. p. 8.)

and in accordance with said survey, a patent issued to Jacob P. Leese, dated August 3d, 1859.

(Finding 11, Trans. p. 8.)

A patent could not issue until the survey had been

approved by the Commissioner of the General Land Office.

§13 Act of 1851, 9 U. S. Stats. at Large, 633.

The only power that is vested in the Commissioner of the General Land Office is that of altering the lines of the survey of the particular decree upon which a patent has not yet issued, and he can make them conform to the decree ; *but he cannot interfere with a survey and alter its lines upon which a patent has already issued.*

The only intention of the Legislature requiring notice to be given, was to give parties interested in appearing and contesting the action of the Surveyor-General an opportunity to show that his survey was not in accordance with the decree ; but it did not contemplate any interference with a survey of lands, the title to which the United States had already relinquished by patent.

And that this was so appears from the fact that the issuance of the patent did not operate as an extinguishment of any claim by the claimants under the Mexican government to the same tract and left them in the same position they were before the patents issued so far as regarded their respective rights to the land, and did not give more effect to the one patent than to the other.

" The patent issued in pursuance of the Act of Con-
" gress which authorizes these proceedings, is conclusive
" only between the United States and the claimants.
" It does not affect the interest of third parties. The
" Act of Congress (3d March, 1851, Section 13) points
" out the mode in which contesting claimants may

" litigate their respective rights to a patent from the " Government."

U. S. vs. *White*, 23 How., 249 at p. 253.

" In a controversy between the parties claiming under two patents, each of which reserves the rights of other parties, the inquiry must extend to the character of the original concessions. The controversy can only be settled by determing which of these two gave the better right to the demanded premises."

Henshaw vs. *Bissell*, 18 Wall., U. S., 266.

IV.

The Supreme Court of California erred in holding that the survey made of the Huichica Grant did not conform to the decree of confirmation.

This was an appeal from the judgment, and therefore heard upon the judgment roll alone. (Trans. p. 17).

The facts upon which the decision was based are found in the findings, and no where else ; and the lower Court found as a matter of fact that a piece of land included within the description in the complaint (and being merely a correct description of the fifteen acres sought to be recovered in the suit) was situated between the Arroyo Seco and the Trancas line, and is within the boundaries described in the grant of the Huichica Rancho, of July 6th, 1844 ; the decrees of confirmation, the surveys and the patent thereof, and also in the deed to Schell.

(Finding 25th, Trans. p. 12).

V.

We think the agreement between Schell and Akers was incorrectly interpreted by the Supreme Court of California, and that they would not have so interpreted had it not been for the erroneous deduction of law regarding the Federal question; and that their whole decision was based upon the Federal question and was the controlling motive for deciding in the manner in which they did.

The Supreme Court of California say:

* * * * * *

"The parties evidently thought that if the city "should finally succeed in establishing its claim, and "receiving a patent for any of the land within the lines "of the Huichica patent, it would have the better title "to the land.

"They could therefore avoid litigation and expense, "and safely await the issue of the city's contest. As "we have seen they rightly interpreted the law, and "so long as Schell lived he acquiesced in the arrange- "ment. After his death his executors thought it their "duty to raise the question again, and this action was "commenced.

"In our opinion the agreement was intended to be, "and was, binding upon the parties and decisive of "their rights when it was executed, and it remains so "still." (Trans. p. 19).

The confirmation of a claim merely determines the validity of the claim as against Mexico; that is to say

(since the treaty) as against the United States. It determines nothing as to competing rights of adjoining owners disputing the boundary line, subsequent purchasers from the original grantee, claiming portions of the tract, or other individuals desiring to contest the extent of the confirmee's right. All such claims are to be prosecuted in the ordinary tribunals, and are not prejudiced by the confirmation of the claim to the petitioners under the Act of 1851.

Meader vs. *Norton*, 11 Wall., 442.

And the issuance of the patent thereon confers no greater rights.

§ 15, 9 U. S. Stats. at Large, 634.
Beard vs. *Federy*, 3 Wall., 478.

The decision of the Supreme Court upon the Federal question was based upon the facts (1) that the land in dispute was a portion of the pueblo lands, and (2) that the lines of the survey of the Huichica grant did not conform to the decree of confirmation. And in so doing they ignored (1) the power of the Mexican Government to divest the pueblo of title, and (2) the findings of the lower Court that the survey did conform to the decree.

At the time that Akers and Schell entered into the agreement (Trans. pp. 4, 5) the latter had commenced an action of ejectment against the former to recover possession of the 111 acres, (Finding 21st, Trans. p. 11) the patent had already issued to Leese for the Huichica grant, (Finding 11th, Trans. p. 8) and Schell was the

grantee of Leese by mesne conveyances (Finding 12th, Trans. p. 8), no patent had issued to the City of Sonoma (Finding 19th, Trans p. 10); therefore Akers was not in the same position in the action, as Schell, and and Schell would necessarily have recovered judgment had he prosecuted his action.

Greer vs. *Mezes*, 24 How., 268.

Singleton vs. *Touchard*, 1 Black, 342.

In this state of affairs, Akers being in possession of all of the land (Finding 20th, Trans. pp. 10, 11) made the agreement, and delivered up possession of one half the land to Schell.

The intention of the parties being to avoid litigation and to await the action of the Commissioner of of the General Land Office upon the objections filed to the survey of the pueblo grant, and if he determined that the lines of the pueblo did not overlap the lines of the Huichica patent, then as the patent could not issue for this identical piece of land to the City of Sonoma, there would be no possible defense on the part of Akers to the action of Schell for the recovery of the land. and rather than needlessly put himself to expense by contesting the action, he would surrender possession.

If the patent did not issue to the City of Sonoma, Akers would have no right to question the title of Schell.

Schell, on the other hand, was willing, knowing the time it usually took in the State of California to determine an action in ejectment, and desirous of

getting possession of the land, and willing to allow Akers to be placed in a position where he could contest and have the whole matter determined in one action instead of two, and taking into consideration the fact that a patent might never issue to the City of Sonoma for this particular piece of land, which under the contract would give him possession to the whole without further litigation, and that if a patent did issue to the City of Sonoma, including this property within its lines that would not have the effect of establishing the right of the City of Scnoma to it, but would leave the parties in a position to have determined the superiority of the respective grants.

The terms used in the instrument are to be understood in their plain, ordinary and popular sense, unless they have acquired a particular sense distinct from the popular sense of the same words.

The word "establish" is not a technical word, used in a special sense by some trade, profession, or art, but is a word in common use, and is defined by Webster to mean: "To settle permanently. To enact or decree by authority."

Addison on Contracts. Edition 1883, book 1, chapter 2, page 287.

It is respectfully submitted that such error has been shown in the decision of the Supreme Court of California, as would justify this Court in correcting it.

W. W. COPE,

Attorney for Plaintiffs in Error.

San Francisco, October 4th, 1889.

Office Supreme Court U. S.
FILED,
DEC 6 1889
JAMES H. McKENNEY,
CLERK

Supreme Court of the United States.

OCTOBER TERM, 1889.

No. 270.

HENRY M HALE ET AL., Executors,

Plaintiffs in Error.

vs.

STEPHEN AKERS ET AL.,

Defendants in Error.

IN ERROR TO THE SUPREME COURT OF THE STATE OF CALIFORNIA.

Brief of Plaintiffs in Error in Reply.

W. W. COPE,

Attorney for Plaintiffs in Error.

Filed ..... *1889.*

..... *Clerk.*

By ..... *Deputy Clerk.*

S. W. Raveley, Printer, 518 Clay St.

Supreme Court of the United States.

OCTOBER TERM, 1889.

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STEPHEN AKERS ET AL.,

Defendants in Error.

PLAINTIFFS' BRIEF IN REPLY.

We claim that the decision of the federal question was of such controlling force that had the Supreme Court of California not decided it erroneously their decision would have been in favor of plaintiffs.

The whole decision in regard to the interpretation of the contract was based upon the erroneous deduction of law regarding the power of the Commissioner of the General Land Office to curtail and avoid a survey upon which a patent of the United States had already issued.

That the Commissioner of the General Land Office was not possessed of such power we have shown in our opening Brief, Point III, at pp. 18, 19, 20 and 21; and we will also refer to our Point V, in the same Brief, at pp. 22 and 23, as bearing out our claim.

In this case there was a decision of a federal question; the decision was adverse to the plaintiffs, was erroneous, and was of such controlling force that the Supreme Court of California based its judgment upon it in the first reason given, and also upon it in the second reason given, which latter was the interpretation of the contract.

Defendants in error moved to dismiss this writ of error for want of jurisdiction, which motion was denied in April, 1889.

It is an elementary principle of law that consent will not confer jurisdiction and the converse is true.

As to what is said on page 8 of defendants' brief in regard to plaintiffs' fourth assignment of error being an admission that the Supreme Court of California has decided that title had been divested by virtue of a written agreement, the construction of which involved no federal question whatever, we answer that though the contract might have been interpreted without deciding the federal question, as a matter of fact it was not, and had it not been for the erroneous decision of the federal

question it would not have been so interpreted. The position we have taken is not at all inconsistent with this assignment of error, nor do we conceive how it can be construed into an admission that a federal question was not involved in the interpretation of the contract.

The law presumes that officers have properly performed their duties.

And therefore, in this case, in the absence of all proof to the contrary, this Court will presume that the Governor, having the power, exercised that power, in conformity with the law, and took all the necessary steps before granting the three and a half leagues to Leese, and if it was necessary for the Governor to have consulted the Aynutamiento or Alcalde, the presumption is that he did so.

The portion of the opinion of *Hart* vs. *Burnett*, printed by defendants on page 12 of their Brief shows that the Governor properly exercised his power in making the grant to Leese, this portion of the grant being upon the outskirts of the Pueblo lands.

There can be no ambiguity about the words "taking the direction of the Arroyo Seco as far as "the Little Hills of Huichica."

Sixth Finding, Trans. p. 7.

The words "as far as the Little Hills of Huichica" have been inadvertently left out of the Ninth Finding (Trans. p. 8) as is evidenced by Findings Sixth, Eleventh and Seventeenth. (Trans. pp. 7, 8 and 9.)

It surely does not mean that the line was to run to the "Trancas," and then instead of running to the Little Huichica Hills, taking the direction of the Arroyo Seco, was to turn back and run directly to the Arroyo Seco, and thence up the Arroyo Seco to the Huichica Hills (Findings Seventeenth and Eighteenth, Trans., p. 10).

Where a thing takes the direction of another in going towards another object, it surely does not mean that it shall go by the most direct line to the thing which direction it is to take and then up that thing to the object; it surely can mean only what the words say, that from that point to the other point the line shall be run, having a course similar to that designated by the words "Arroyo Seco."

The "Trancas" was an object, and is included in both patents, as well as in both grants.

The decision of the Commissioner of the General Land Office had no effect upon the patent or the lines of the Huichica Ranch.

Plffs. Brief, Point III, pp. 18, 19, 20 and 21.

We respectfully submit that this Court has jurisdiction, and that plaintiffs are entitled to have the errors of the Supreme Court of California corrected.

W. W. COPE,

Attorney for Plffs. in Error.

No.

In the Supreme Court

of the

United States.

HENRY M. HALE, ET AL.,
PLAINTIFFS AND APPELLANTS,

vs.

STEPHEN AKERS, ET AL.,
DEFENDANTS AND RESPONDENTS.

Respondents' Points and Authorities

BARCLAY HENLEY,
RUTLEDGE & McCONNELL,
Attorneys for Respondents.

Filed ..... *1886.*

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By ..... *Deputy Clerk.*

Santa Rosa Republican Print

In the Supreme Court

OF THE

UNITED STATES.

HENRY M. HALE, ET AL.,
vs.
STEVEN AKERS, ET AL.

Respondents' Points and Authorities.

The appellant must fail, because of the contract between Akers and Schell, dated Oct. 11th, 1860. (Findings, folio 62, Transcript.)

At this time Schell had his patent—his rights were fixed. He knew as well then as he ever could know his rights under the patent of Huichica. He knew where his trancas line was, and so did Akers. He knew that he only could be affected by the issuing of a patent to the city of Sonoma. He knew that the city of Sonoma was prosecuting its claim before the United States tribunals to establish its claim to the land, and so knowing brought his action of ejectment to recover the premises.

Under these circumstances he makes the contract with Akers, the plain intent and meaning of which is, that both agreed to abide the deci-

sion on the claim so presented by the city, and on making the contract dismissed his suit.

White & Tudor's Leading Cases in Eq., Vol. 2, part 2, page 1703.
Merritt vs. Campbell, 45 Cal., 542.

The Court will see by inspection of the paper that the terms used by the parties are, "That in the event the *city of Sonoma establishes her claim*," not that if Akers or any other individual establishes a claim, clearly, showing that there was nothing in their minds relating to individual actions

Has not the city established her claim, and is not the patent the highest proof of that fact? It is entirely immaterial whether Akers could establish his claim or not. That is not what they agreed upon. Schell agreed to deliver back the possession in the event the city established her claim, nor can he have an action until the city fails to establish her claim. Has she failed? If so, when and where did the failure occur? She is not a party to this suit, and cannot fail here.

The plaintiff says," "The parties were neighbors, and wished to live in peace without sacrificing their rights," but it cannot be possible that they contemplated renewing the controversy at the end of five years, as suggested by plaintiff, but they undoubtedly intended to avoid all litigation between themselves, and for that purpose Schell dismissed his pending action of ejectment, and agreed that the decision of the Government

should be final between them. Any other construction would render the agreement mere nonsense. An agreement that in case a Court of competent jurisdiction in an action of ejectment should decide one party had a better right to the land than the other, that he would give it up has no element of settlement in it, because no other result could possibly follow. And their agreement was to avoid litigation between themselves.

White & Tudor's Leading Cases in Eq., Vol. 2, part 2, p. 1703

People vs. Supervisors of S. F., 27 Cal., 655, 677 and 681.

1 Parsons on Cont, 363 and 364.

Penn vs. Lord Baltimore, 1 Vesay Sen. 444.

But should the Court take the view of the plaintiff, what is the result? Stripped of verbiage, it is this—that Akers was to hold the land until Schell could put him out by a suit at law, and is not obliged to wait until the city failed to establish its claim or failed in the attempt. Then and in that case a right of action accrued—the very moment the contract was signed a right of action existed. There is no time fixed in which he is to wait, and having a right of action the statute of limitations would run.

Or he must show that the city has failed to establish her claim in some Court of competent jurisdiction and not having even attempted that, ejectment will not lie. This decision of the state court on this point is final and conclusive

THE PATENT TO THE CITY CONFERRED THE BETTER TITLE.

The Government having issued two patents for the same land is proof that either has been improvidently issued, and to the extent of its interference with the other is inoperative, or that error has intervened in the survey.

Henshaw vs. Bissell, 18 Wal., 255.

The patent was issued to the Huichica on an *ex parte* hearing and is not conclusive. The city of Sonoma did not have an opportunity to be heard, and is not bound by the survey made of the Huichica.

Rodrigues vs. United States, 1 Wal., 582.

On the point here made, see opinion 591.

Henshaw vs. Bissell, 18 Wal., 265 (opinion.)
Shepley, et al., vs. Cowen, 1st Otto, 230.
See opinion, page 340.
Lindsey et al., vs. Hawes et al., 2 Black, 554.
O'Brien vs. Perry, 1 Black, 139.
The State of Minnesota vs. Bachelder, 1 Wal., 109.
Barnard's heirs vs. Ashley's heirs, 18 Howard, 43.
Lyttle vs. State of Arkansas, 22 Howard, 192.
Bloom vs. Burdeck, 1 Hill (N. Y.) 139.
Johnson vs. Towsley, 13 Wal., 22.

On a hearing had before the United States Land Department on the boundary line between the city of Sonoma and Huichica when all par-

ties were represented it was adjudged that error supervened in the survey of the Huichica grant and the true line established, fixing the Aroyo Seco as far as the salt marsh as such boundary. (See Finding 17).

We think the decision of the Commissioner is conclusive, notice having been given and all the parties interested being present and contesting the claim of the other. The survey of the pueblo and the boundaries fixed upon a regular trial was not *ex parte*.

See Act of Congress of July 1, 1864.
Vol. 31, Statutes at large, page 222.
Henshaw vs. Bissel, 18 Wallace, 264 and 268.
Shepley vs. Cowan, 1 Otto, 340.
Warran vs. Van Brunt, 19 Wal., 646, 653.
Dill vs. Leith, 53 Cal., 712.
Johnson vs. Towsley, 13 Wal., 72.
Hosmere vs. Wallace, 47 Cal., 461.

The decree of the Court did not give to the Huichica any part of the pueblo of Sonoma. (See finding 9.) Neither did the Mexican Governor. (See findings, 3, 4 and 6.)

Even if the Governor intended—which he did not—to convey this part of the pueblo to Leese, it was not in his power to do so, because occupied. (See finding 15.)

Schmidt's Civil Law of Spain and Mexico, page 113.
United States vs. Workman, 1 Wal. 761 and 765.

Things belonging to the nation or to towns can not be alienated without Royal permission.

White's Recap., 582.
Mexican Congressional Doc. relative to Cal., 1850, pp. 120-191.

The cases relied on by the plaintiff are not applicable.

Waterman *vs.* Smith, 13 Cal., 373, is not in conflict with our position. There were two grants by the Mexican Government to the same tract of land—to Solano of four leagues, and to Armijo of three leagues; both require judicial possession to be given by the public officer of the vicinity by *whom the boundaries* are to be *designated*. (See pages 410 of opinion.)

In neither was judicial possession given nor the boundaries fixed.

There can be no doubt that the title did not pass or become complete in the grantee from the Mexican government, for any specific piece of land until these requisites were complied with.

The United States Government has deemed it its duty to give the possession and fix the boundaries by making surveys according to the description in the grants, and issuing patents therefor.

The case quoted shows this sufficiently, and in addition thereto, see

Henshaw vs. Bissell, Supra.

The grant to Solano was presented to the Commission under the Act of 1851, approved, surveyed and patented. The grant to Armijo was presented and rejected and an appeal taken to the United States Supreme Court, where it was pending at the time of the decision we are considering. (See page 408 of opinion.) Neither of the tracts granted had boundaries, but was, for designated quantity, to be taken from a larger tract. Under this state of facts the Court held that it was the duty of the Mexican, and a sort of inherited duty of the United States Government, to fix the boundaries of each and give the judicial possession. And having done so in the case of Solano, and not in the case of Armijo, the Court *could* not fix his boundaries nor give him possession; that duty being political in its nature the title of Solano must prevail. Armijo having a right, if any, to three leagues, to be sometime measured off to him from a larger tract of the public domain, could not resist the title of Solano, who had his measured off; and besides, the Government had a right to give him his three leagues at any place within the larger area.

Leese *vs.* Clark, 13 Cal., 572, is a case no more in point than the other we have examined.

This case first came before the Supreme Court. (3 Cal., 17.) Neither party had a patent from the United States. And neither party could pre-

vail in an action of ejectment, because not possessing a *legal title*.

The plaintiff failed because he did not have his grant confirmed by the Departmental Assembly, and he never had judicial possession. When the case came up again (18 Cal., 535), Leese had a patent upon confirmation of his grant. Clark, however, had not. He relied upon his deed from the Alcalde of Yerba Buena. There can be no doubt that the inchoate claim on the part of the town must fail. The decision has no application to this case, because we stand upon a patent holding a legal *title* as well as the plaintiff.

The Court in Henshaw *vs.* Bissel, 18 Wal., 265, there say of these California cases: "Those cases were all actions of ejectment in which imperfect or equitable claims, or interests arising since the acquisition of the country, were set up against the legal title held under patents; and the subjects there considered were the effect of the patent as a conveyance of the Government and as evidence of the validity of the patentee's claim and of its confirmation and survey as against parties having such imperfect or mere equitable claims or subsequently acquired interests."

Our position is this: "The *fact* that *two surveys embrace the same land* is itself proof that either of the original concessions was *improvidently* issued, and to the extent of its interference with the

other was inoperative, or that error has intervened in the surveys."

Henshaw vs. Bissell, 18 Wal., 265 of opinion.

And that both parties have a standing in a *court* of law, and the Court is thus compelled to look beyond the patents to the original source of title.

And although the Court may not correct the survey in an action of ejectment it will determine its inconclusiveness to the extent essential to the protection of the prior rights of other parties.

Henshaw vs. Bissell, 18 Wal., 264–5.

There can be no doubt that a person holding a patent issued on a confirmed grant has a position in Court to question the validity not only of the opposing patent, but of the survey.

Another case relied on by plaintiff (Grisan *vs.* McDonald, 6 Wal., 372), is in the same condition with the Cal., decisions. San Francisco had presented its claim to the Commission demanding recognition by the Government. The claim of the city was established to all of its pueblo, except such parcels of land as had been previously reserved or dedicated to public uses by the United States. (See page 377). And the lands so reserved or not confirmed to the city were the very tracts

in dispute. (378, top of page. and 379, bottom).

The Court bases its decision on the well known and true ground that the grant to the city was what is known as a "floating grant"—that is, a grant to a specific *quantity*, and not a tract specifically *defined*. (See page 380 of the opinion, 6 Wal.) And the city could not assert a claim against the Government until its precise limits were fixed by the officers of the Government. (Page 380 and 374.)

Before passing from this case we wish to call attention to the fact that the claim of the city of San Francisco to its pueblo lands was never finally allowed under the Act of Congress of 1851. But, on the petition of the people and resolutions of the Legislature, Congress confirmed the claim, clogged with the conditions of the Van Ness ordinance and the acts of the Legislature of the State. This, no doubt, was done to avoid the force of a patent issued upon an approved survey under a confirmed grant from Mexican authority under the Act of Congress of 1851.

We contend that the Mexican Governor of California in 1844 could not grant lands within an established existing and *occupied* pueblo with defined boundaries, and that if he attempted it his acts would be void.

And secondly, that the Governor did not intend and did not in fact grant any of the pueblo of Sonoma to Jacob P. Leese.

The authority of the Governor was by Mexican law strictly confined and limited to granting *unoccupied* public land.

United States vs. Workman, 1 Wal., 745. See opinion 761 and 765.

It is there decided that, under the law of Mexico, mission lands could not be granted by either or both the Governor and departmental assembly, because they were occupied lands. And as we understand the Court the same law applies to town lands or pueblos.

Certainly the tenure of the priests to the missions cannot be held to be of a higher or better degree than the occupants of town lots. There never was a grant made of the missions. The bishop or priests held by suffrance of the supreme Government of Mexico, and without authority, except something in the nature of a passive acquiescence, but the control of their lands was reserved to the supreme Government. They were not deemed unoccupied. The Governor in 1844 did not grant any part of the pueblo to Jacob P. Leese. In his first application Leese makes the Aroyo Seco the boundary between Huichica and Sonoma as far as the salt marsh. This was accompanied by the diseno, or map, also fixing the same boundary. This was also the boundary of Sonoma laid out, platted and *occupied*, down to the point of the salt marsh.

Under the first grant to Leese he attempted to get judicial possession not only of the land granted, but of part of the pueblo, but on report to the Government it is held to be void.

Leese then asked for more land, not outside of the boundaries of his original grant, but within such boundaries. There is no hint to the Governor of any intention of encroaching on the pueblo land. That the pueblo extended down the Aroyo Seco to the salt marsh, the decree of the Land Commission conclusively show. The petition of Leese represents to the Governor that he only wants the grant of all the land within the exterior boundaries, as first asked for. Now, if the Governor supposed that Leese intended any encroachment upon occupied lands he would require all the neighbors of the vicinage to be consulted in any change of boundaries as required by law and the practice.

See Romero vs. United States, 1 Wal., opinion 739 and 740.

No such thing was done or contemplated, because the Governor supposed, and he had a right to suppose from the representations of Leese, that he was only granting him all the land within the exterior boundaries of his former grant, and adjoining Sonoma, not taking any part of it.

(See Findings 3 and 4.)

But Leese presented a new diseno with his last petition, calculated, no doubt, to mislead. The Governor knew that the pueblo extended to the Huichica, under the old grant, and this diseno, taken with the petition, would lead any one to suppose that Leese was running his boundaries along the line of Sonoma from the embarcadero to the Aroyo Seco, and with no intention of interfering with the rights of the city. The Governor, when assured by the petition that the original boundaries were correct and as they should be, and were as he asked for and no more, and further representing that his new diseno did not in fact change the original boundaries, he, the Governor, taking these facts to be true, made him the grant. Can a grant procured by such fraudulent representations prevail against the existing rights of innocent parties? If the diseno did include a part of the pueblo it might be good against the Government; it can not be good against the prior occupants.

In all the cases we have noticed where the question came up, it appears that the grant of the Governor was to a specific portion of unoccupied pueblo, but in this it is an attempt to steal it on the part of Leese. But we say the Governor not only did not intend to convey the pueblo, but that he did not in fact grant it. And in addition to what we have already said, we refer to the decisions of the Commissioner of the Land Office of

March 8, 1876, and April 29, 1879. That that officer had authority to so find, we refer to the Act of Congress of July, 1864, Vol. 13. Statutes at large, page 332. And that it is conclusive against the plaintiff, see Henshaw *vs.* Bissell, 18 Wal., opinion, pages 264 and 268, and authorities cited by us:

Rodrigues vs. United States, 1 Wal., 591.
United States vs. Halleck, 1 Wal., 453.
Shipley vs. Cowan, 1 Otto, 340, and see Findings, 17 and 18.

There is no question about the boundaries of Sonoma, and never was, and when found valid by the commission is conclusive.

Beard vs. Federy, 3 Wal., opinion, 489 and 491.
See Decisions of the Commissioner of the United States Land Office.
Higuras vs. United States, 5 Wallace, 837.

BARCLAY HENLEY,
RUTLEDGE & McCONNELL,
Atty's for Respondent.

Service by copy of the within Brief is hereby acknowledged this ..... day of September, 1886.

.....

Attorneys for Appellants.

State of California, County of Sonoma—ss.

I hereby acknowledge the receipt of two copies of the within Brief this ..... day of September, 1886.

.....

Clerk.

By .....*Deputy Clerk.*

Office Supreme Court U. S.
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Supreme Court of the United States.

OCTOBER TERM, 1888.

No. 552.

HENRY M. HALE, *et al. Ex'rs., Pl'ffs., in Error*
~~*Appellants*~~,

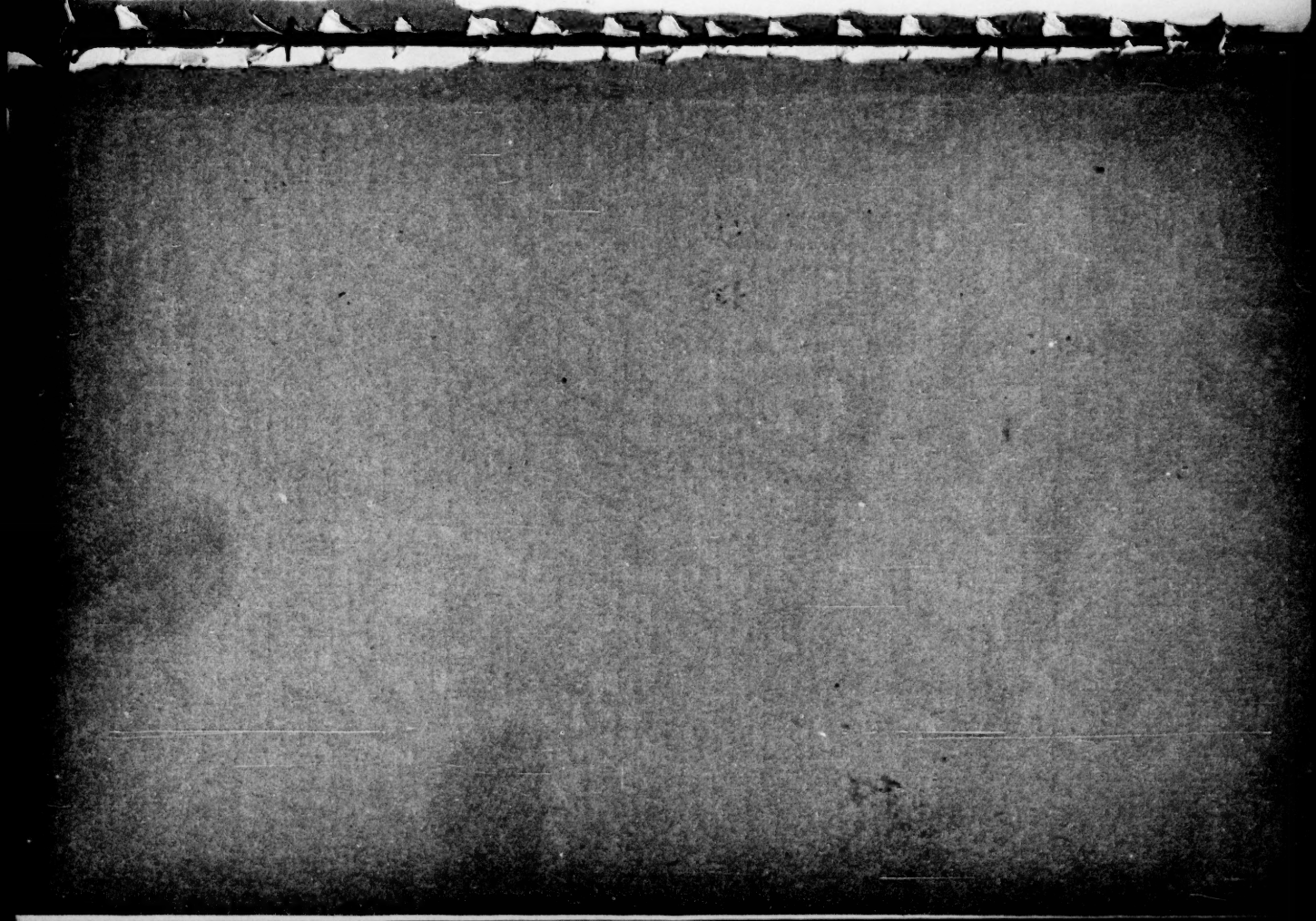
vs.

STEPHEN AKERS, *et al. Def'ts.*,
~~*Appellees.*~~

MOTION TO DISMISS.

FRANK W. HACKETT,
for Appellees.

R. O. Polkinhorn, Printer.



Supreme Court of the United States.

OCTOBER TERM, 1888.

No. 552.

HENRY M. HALE, *et al. Ex'rs., Pl'ffs.*, ~~*Appellants*~~,

vs.

STEPHEN AKERS, *et al. Def'ts.*, ~~*Appellees.*~~

MOTION TO DISMISS.

Deft. in Error

And now this 30th January, 1889, come the ~~appel-~~lees and move the Court to dismiss the writ of error in the above entitled cause for want of jurisdiction.

By their Attorney,

FRANK W. HACKETT.

BRIEF.

This is a writ of error to the Supreme Court of California. The case is fully set forth in the opinion of the court below, a certified copy of which from the record is herewith appended.

I.

This Court will look at the opinion of the court below to see upon what grounds their decision was made. *McManus* v. *O'Sullivan*, 91 U. S., 678.

Although the language of the Court in *Moore* v. *Mississippi*, 21 Wall., 639, quoting from *Murdock* v. *Memphis*, would seem to imply the necessity of our printing the entire record, we have ventured to make this motion upon the printed opinion alone.

1. To save expense of printing the ~~appellants~~ plff's record;

2. The ~~appellants~~ plff have ample time and opportunity to reply, printing such portions of the record as they may deem advisable;

3. Here the opinion recites all the facts, and shows enough of the pleadings to render it certain what questions were actually decided;

4. The opinion shows that the court disposed of the case upon a question of general law that controlled. Hence, it is immaterial what federal questions were likewise involved, or how they were decided; and further expense for printing would be needless.

II.

To entitle ~~appellants~~ plff to prosecute this writ of error the record must show that the court below decided a federal question, the determination of which was necessary to the judgment. *De Saussure* v. *Gaillard*, 127 U. S., 216.

The action sought to recover possession of about fifteen acres of land in Sonoma County, California—

the parties claiming under two conflicting patents. The court enquired into the meaning of words fixing a boundary in a patent issued to the city of Sonoma for Pueblo lands in 1880. To this extent it may be admitted that a federal question presented itself.

But an examination of the opinion shows that the controlling feature of the decision is the construction and effect of a written agreement entered into by the parties in October. 1860, the determination of which was a question of general law.

Plaintiff's decedent (Schell) brought an action against Akers (the ~~appellee~~ deft), September, 1860, to recover 111 acres, of which the land in controversy here is a part. The parties compromised by entering into a written agreement, and plaintiff thereupon dismissed his suit. The parties divided the entire tract into two nearly equal fields, fenced it, and each respectively occupied his own field—subject to the agreement, and awaiting the result of the prosecution by Sonoma of its claim before the proper tribunals of the United States.

The California court say: "There are *two* sufficient answers to the claims made by the appellant." They then proceed to decide that "the agreement was intended to be, and was binding upon, the parties, and decisive of their rights when it was executed, and it remains so still."

It is immaterial, therefore, what views the court may have entertained of the action of the General Land Office in passing upon the words "taking direction of the Arroyo Seco." The decision of that question was not necessary, because the court distinctly

finds that the obligation Schell assumed under the agreement of October, 1860, is "a sufficient answer" to the claim now made by his executors.

Had the court indeed reached a conclusion that the General Land Office fell into error, still it follows that, as no appeal had been taken, and the city of Sonoma had fully established her claim, they would have been obliged to decide that by the terms of the compromise plaintiffs had no right of action.

Although the record disclose that a state court, as a matter of fact, has passed upon a federal question, this Court will make an analysis of the case to ascertain whether the decision be necessary to the judgment. And if the court below has decided another point in the case that is final, which does not involve a federal question, this Court will decline to review the judgment. *De Saussure* v. *Gaillard*, *ut sup.*

We respectfully submit that the appeal should be dismissed.

FRANK W. HACKETT,
for ~~Appellees~~.

APPENDIX.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1888.

No. 552.

HENRY M. HALE and GEORGIANA L. SCHELL, *Executors of* THEODORE L. SCHELL, *Plaintiffs in Error*,

vs.

STEPHEN AKERS and MONTGOMERY AKERS.

IN ERROR TO THE SUPREME COURT OF CALIFORNIA.

Filed November 19, 1886.

EXTRACT FROM RECORD.

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[1] OPINION.

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA.

DEPARTMENT TWO.

[Filed March 26, 1886.]

HALE *et al.* *vs.* AKERS *et al.* } No. 8,099.

This is an action to recover possession of about fifteen acres of land in Sonoma County. Both parties claim title in fee. The plaintiffs deraign their title from Jacob P. Leese, to whom a Mexican grant of five and a half leagues was confirmed, and in August, 1859, patented by the United States. The defendant, Stephen Akers, deraigns his title from the city of Sonoma, to which a patent was issued by the United States in March, 1880, for certain lands confirmed to it as Pueblo lands. Both

patents cover the land in controversy, and the question for decision is, which party shows the better right to it.

The facts, as found by the Court below, are as follows:

[2] In October, 1841, the Governor of California made a grant to Jacob P. Leese of the place called Huichica, in the neighborhood of Sonoma, containing two square leagues, and having for its western boundary the Arroyo Seco. In July, 1844, the Governor made a second grant to Leese of three and a half leagues of the land called Huichica, and bounded "on the west by Estero de Sonoma, as far as the Trancas, taking the direction of the Arroyo Seco as far as the Little Hills of Huichica."

In April, 1852, Leese presented to the Board of Land Commissioners a claim for confirmation of his title to the whole Huichica tract of five and a half leagues, and his claim was confirmed by the Board in April, 1853, and by the United States District Court in 1856. The appeal to the Supreme Court was dismissed in December, 1856. The decree of confirmation gave to Leese the land known by the name of "Huichica," containing five and one-half square leagues, and bounded it "on the south by the marshy land adjoining the Bay of San Francisco, and on the west by the estero of Sonoma, as far as the Trancas, taking the direction (el rumbo direction of course) of the Arroyo Seco." Under this decree a Deputy

[3] Surveyor made survey of the Huichica in December, 1858, and his survey was approved by the U. S. Surveyor General of the State, on June 4, 1859. No notice was given of the survey or of its approval, and neither the city of Sonoma nor any officer thereof, nor the defendant, had any notice of the proceeding relative to its approval. In accordance with this survey a patent for the Huichica Rancho was issued by the United States to Leese, dated August 3, 1859. It was in the usual form of patents issued for confirmed Mexican grants, and recited the second grant, the confirmation and the survey. The western boundary as shown on the plat in the patent, is the Sonoma creek, from a post marked L, at the Lower Landing, as far as a post marked L at the Trancas; and thence a straight line running north 37 degrees east, 156 chains, to a post marked L, on the Arroyo Seco, at the Huichica hills. This last line is known as the "Trancas line."

In June, 1835, the Governor of California instructed Gen. Vallejo, Director of Colonization, to establish the Pueblo of Sonoma; and in that year Vallejo established the pueblo and made a survey thereof with the following boundaries:

[4] "On the east the Arroyo Seco, from the vineyard of Salvador Vallejo to the salt marsh on the bay; thence along the salt marsh westerly to Sonoma creek; thence up that creek to the

Agua Caliente creek; thence easterly to the foothills north of the city to the place of beginning." This tract Gen. Vallejo laid out and platted into lots and blocks, and in the year 1835 established families on the same, occupying the tract along the Arroyo Seco, down to the point where it entered the salt marsh. He also made a report of all his proceedings to the Governor, and they were duly approved.

In May, 1852, the Mayor and Common Council of the City of Sonoma presented to the Board of Commissioners their claim, and as successors of the pueblo, for all the land of the Pueblo of Sonoma, as established by Vallejo; and their claim was confirmed by the Board in January, 1856. An appeal was taken to the District Court, and under the provisions of an act of Congress, passed July 1, 1864, the case was transferred to the Circuit Court, where the claim was confirmed on the 2d day of November, 1864. The decree of confirmation fixed the Arroyo Seco as the Eastern boundary of the pueblo.

[5] In September, 1868, a survey of the land, so confirmed, was made by the Surveyor General, and in August, 1872, was reported to the Land Department for approval. Due notice of this survey was given and published, as required by the act of Congress of July 1, 1864, and the matter of the conflict between this survey and the survey of the Huichica grant was heard before the Commissioner of the General Land Office in March, 1876.

That officer adjudged and determined that "a direct line running from the point marked 'Trancas,' on Sonoma creek, to the point where the Arroyo Seco enters the salt marsh, and thence following the direction of the Arroyo Seco to the Little Huichica hills, should constitute the southeasterly boundary of the Pueblo of Sonoma," and directed the Surveyor General to amend his survey accordingly. An amended survey was made as required and due notice thereof given. The amended survey was reported to the General Land Office for approval, and upon a hearing had before the Commissioner in December, 1878, that officer approved the survey and fixed the Arroyo Seco as the boundary between the Pueblo of Sonoma and the Huichica grant. No appeal was taken from this decis-

[6] ion and the same became final. A patent for the Pueblo lands was issued by the United States to the Mayor and Common Council of the city of Sonoma, in accordance with the decrees of confirmation and survey, dated March 31, 1880; and this patent covered 423 acres of land embraced in the Huichica patent, of which the fifteen acres in controversy are a part.

In 1851 the defendant, Stephen Akers, entered into the possession of the land sued for under a contract with the city of

Sonoma for its purchase, and he has remained in possession, cultivating and improving it, ever since. In May, 1858, the city conveyed to him this land and enough more to make 111 acres, it all being within the city limits as surveyed and patented.

In January, 1859, the grantee of Leese conveyed to Theodore L. Schell, the plaintiffs' testator, 470 acres of land, parcel of the Huichica Grant, as surveyed and covering the 111 acres conveyed as aforesaid to Akers.

In September, 1860, Schell commenced an action against Akers to recover from him the possession of all of the 111 acres, and while the action was pending the parties to
[7] it, on the 11th day of October following, entered into a written agreement, which was signed and acknowledged by them and recorded. By this agreement Akers released to Scehll the east half of the 111 acre tract, which was described by metes, bounds, and the agreement then proceeded as follows:

"The said Schell hereby covenants and agrees that in the event the city of Sonoma establishes her claim to any part or portion of the above released tract of land, that he will deliver the possession of the same, or such portions thereof as may be so established, together with a yearly rent from this date of $5 per acre for the land so to be delivered. And the said Akers hereby covenants and agrees, that in the event of the city of Sonoma not being able to establish her claim beyond the present line of the Huichica patent, that he will deliver possession to the said Schell of all or such portion of the remainder of said above described tract of land, as may be within the line of said Huichica patent, and will pay a yearly rent for the same, at the rate of $5 per acre to the said Schell."

[8] The action was then dismissed and a fence was built by the parties, extending northerly across the land and dividing it into two fields of nearly equal size. Akers surrendered to Schell all that portion lying east of the fence and retained possession of all that portion lying west of it.

The land in controversy here is a part of the land which Akers so retained in his possession.

Upon the findings the court rendered judgment in favor of the defendants. The plaintiffs appealed and the case is brought here on the judgment roll.

There are two sufficient answers to the claims made by the appellants.

1. It was expressly provided by the Act of Congress, passed March 3, 1851, entitled, "An Act to ascertain and settle the private land claims in the State of California," that the final

decrees of the Board of Commissioners, or of the District or Supreme Court, or any patent to be issued under the act, should be conclusive only between the United States and the claimants, and should not affect interests of third persons. (*Rodrigues* vs. *The United States*, 1 Wall. 588.)

[9] It has been held by this court that the "third persons" against whose interests the action of the Government and patent are not conclusive, are those whose title accrued before the duty of the Government, and its rights under the treaty attached. (*Teschmacher* vs. *Thompson*, 18 Cal. 27.)

Where two patents cover the premises in controversy, "the main question in the case, as in all cases where patents founded upon previously existing concessions overlap, is which of the two original concessions carried the better right to the premises." This was said in *Henshaw* vs. *Bissell*, 18 Wall., 355), and in that case, there being two patents covering the same land, it was held that in determining such a controversy a grant of land identified by specific boundaries, or having such descriptive features as to render its identification a matter of absolute certainty, gives a better right to the premises than a floating grant, although such floating grant be first surveyed and patented.

Here it appears that the Pueblo of Sonoma was established by the direction and with the approval of the Governor of California in 1835. Its boundaries were surveyed and

[10] fixed. The tract was laid out in lots and blocks and families were established upon those lots and blocks along the Arroyo Seco, which was its eastern line down to the salt marsh.

"By the laws of Mexico, in force at the date of the acquisition of the country, pueblos or towns were entitled, for their benefit and the benefit of their inhabitants, to the use of lands constituting the site of such pueblos and towns, and of adjoining lands within certain prescribed limits. This right appears to have been common to the cities and towns of Spain from an early period of her history, and was recognized in the laws and ordinances for the settlement and government of her colonies on this continent. Those laws and ordinances provided for the assignment to the pueblos or towns, when once established and officially recognized, for their use and the use of their inhabitants, of four square leagues of land." (*Townsend* vs. *Greeley*, 5 Wall., 336.) And when pueblos were established they became invested, even without any formal assignment, with a certain title to the pueblo lands. This title was

[11] recognized by the act of March 3, 1851, as in the nature of a grant, and it has ever since been upheld and protected by the decisions of this court as of the Supreme Court

of the United States. (*Hart* vs. *Burnett*, 15 Cal., 530; *Grisar* vs. *McDowell*, 6 Wall., 363.)

In the first grant to Leese the Arroyo Seco is expressly named as its western boundary. In the second grant, and in the decree of confirmation, the western boundary is the Estero de Sonoma as far as the Trancas, thence taking the direction of the Arroyo Seco.

It has been held, when a land claim had been confirmed by a decree of the District Court, under the Act of March 3, 1851, and the decree fixed the boundaries of the claim, and remained unreversed, that the survey must conform to the decree in all respects. (*The Fossat Case*, 2 Wall., 649.)

What was meant by the words "taking the direction of the Arroyo Seco?" It seems to us, as it did to the Commissioner of the General Land Office, when the matter of the conflict was before him, that the line was to run from the Trancas to the nearest point on the Arroyo Seco and thence up
[12] that creek or gulch. If this be so, then it is clear that the line, as run by the surveyor, did not conform to the decree, but took in lands not covered by it.

It must follow that to the lands so taken in, the original concession to the Pueblo and the patent issued upon the confirmation thereof carried the better right.

When Schell and Akers executed their written agreement in October, 1860, the Huichica patent had been issued to Leese, and Schell had his deed. The Sonoma claim had been confirmed by the Commissioners and took in the land lying between the Trancas line and the Arroyo Seco. The city was asserting a right to that land, and the case was pending before the courts.

Akers had a deed to 111 acres of the land and was in possession of it. Under these circumstances the parties compromised the action, which had been commenced, by dividing the 111 acres about equally between them. Akers released and surrendered to Schell the eastern half and retained the western half. In consideration of this Schell agreed, "in the event the city of Sonoma establishes her claim to any
[13] part or portion" of the land released, to deliver back to Akers such part or portion, and to pay a yearly rent of $5 per acre for the same while he might hold it. And Akers agreed, in the event the city should not be able to establish her claim beyond the line of the Huichica patent, to deliver to Schell so much of the land as he retained within that line, and to pay to him a like rent of $5 per acre.

It is clear from this we think that the only establishment of the Sonoma claim, which the parties contemplated, was such

as would result from the action of the courts upon it, and the issuing of a patent by the Government in pursuance of their decrees. The parties evidently thought that if the city should finally succeed in establishing its claim and receiving a patent for any of the land within the lines of the Huichica patent it would have the better title to the land.

They could, therefore, avoid litigation and expense and safely await the issue of the city's contest. As we have seen they rightly interpreted the law, and so long as Schell lived he acquiesced in the arrangement. After his death his executors thought it their duty to raise the question again,
[14] and this action was commenced.

In our opinion the agreement was intended to be, and was, binding upon the parties and decisive of their rights when it was executed, and it remains so still.

The judgment should be affirmed.

BELCHER, C. C.

We concur.

SEARLS, C.,
FOOTE, C.

By the Court.

For the reasons given in the foregoing opinion the judgment is affirmed.

SUPREME COURT OF THE UNITED STATES.

I, James H. McKenney, Clerk of the Supreme Court of the United States, do hereby certify that the foregoing manuscript pages, numbered from one to fourteen, inclusive, contain a true extract from the transcript of the record in the case of Henry M. Hale et al. Executors, &c., *vs.* Stephen Akers et al., No. 552, October Term, 1888, as the same remains upon the files of said Supreme Court.

In testimony whereof I hereunto subscribe my name and affix the seal of said Supreme Court, at the city of Washington, this 30th day of January, A. D. 1889.

[SEAL.] JAMES H. McKENNEY,
Clerk of the Supreme Court of the United States.

Wm. D. Bliss, Esq., who represented the plaintiffs below, and whose name appears as sole counsel in this Court, died in California, 1st November, 1886.

Rule Six is silent as to procedure where there is no counsel for plaintiffs in error on whom notice of motion to dismiss can be served. We have tried to notify the parties themselves. Mr. Hale, we learn, resigned as executor 8th July, 1886. We have filed a certified copy of the order of court accepting the resignation and discharging him; but we have not thought it necessary to print it—the fact being substantially set forth in affidavit printed below.

We have used diligence in ascertaining the address of Mrs. Schell. The copy of motion and brief was personally served on her attorney (a lawyer) at San Francisco, February 12th, in ample season for him to give her more than thirty days' notice. She has had, besides, a copy of the papers for three weeks at Paris; at least, it was mailed to her.

We have in good faith complied with the spirit of the rule as to notice; and we ask the Court to consider our motion at this term.

NOTICE.

To HENRY M. HALE and GEORGIANA L. SCHELL,
Executors of Theodore L. Schell.

Please take notice that on the 1st day of April, A. D. 1889, the motion, of which the foregoing is a copy, will be submitted to the Supreme Court of the United States for the decision of the Court thereon. Annexed hereto is a copy of my brief or argument in support of said motion.

(Signed) FRANK W. HACKETT,
Attorney for Appellee.

AFFIDAVITS.

Montgomery P. Akers, being first duly sworn, deposes and says that he is a male citizen of the United States, of the age of twenty-one years and upwards, and not interested in or a party to the action referred to in the within brief. That he personally served the within brief and notice upon Frank T. Hoburg, attorney of Mrs. Schell, executor of the estate of T. L. Schell, deceased, personally at the City of San Francisco, State of California, on the 12th day of February, A. D. 1889, by giving to him and by leaving with him a true and correct copy of the annexed brief and notice.

MONTGOMERY P. AKERS.

Subscribed and sworn to before me this 13th day of February, A. D. 1889.

F. BREITERBACH,
Notary Public. [L. S.]

Montgomery P. Akers, on oath deposes and says that he is forty-nine years of age and a citizen of the State of California. That the circumstances under which he served notice of motion to dismiss and a copy of brief in *Hale* vs. *Akers*, Supreme Court of the United States, are as follows: At the request of S. Akers, defendant, he made diligent enquiry

for the whereabouts of said Hale and of Mrs. Schell, the representatives of the estate of Theodore Schell; that he found from the records of the Superior Court in and for the city and county of San Francisco, State of California, that the said Hale is no longer the Executor of the estate of said Schell, having been discharged by the said Superior Court on the 8th day of July, A. D. 1886, and that Mrs. Schell had gone to France. He obtained her address. Affiant also learned from the records of the said Superior Court that Mrs. Schell is now the only Executrix of Theodore Schell; that no one is associated with her as Executor or Executrix in the management of said estate. Affiant found out that Mrs. Schell had constituted Frank T. Hoburg, Esq., a lawyer of San Francisco, her attorney and agent to manage her affairs. Mrs. Hoburg told me this fact, and your affiant believes it to be true. Affiant further believes that Hoburg is the attorney and agent for said Mrs. Schell from the fact that said Hoburg is in possession of all her books and papers, and all the books and papers belonging to the estate of Theodore Schell. Mr. Hoburg told me this fact, and your affiant believes it to be true. Mr. Hoburg told him, however, that he had no authority to act as counsel in this case or accept notice. Your affiant has reason to believe, and did then and there believe, that notice given said Hoburg would reach Mrs. Schell, and that the only certain way to get to her attention the fact of the proposed motion to dismiss was to serve notice on Mr. Hoburg, and to have a copy of the motion and brief mailed to Mrs. Schell, in Paris, which address your affiant obtained from Mr. Hoburg. Your affiant has no interest in this litigation.

MONTGOMERY P. AKERS.

Subscribed and sworn to before me this 21st day of March, A. D. 1889.

ROBERT A. POPPE,
Notary Public. [L. S.]

I, George D. Brookes, of Washington, D. C., on oath depose and say I am of lawful age. I am a clerk in the office of Frank W. Hackett, counsel for the defendant in error. On Wednesday the 27th day of February, 1889, I deposited in the Post Office at Washington, D. C., a letter, postage prepaid, addressed to "Mrs. Georgianna L. Schell, executrix of Theodore L. Schell, No. 3 Place Francois Xavier, Paris, France." Said letter contained a notice, of which the above is a true copy, and a printed copy of the brief on the motion to dismiss. I am informed that the same probably left New York the following Saturday by *Le Bretagne*, of the French line, so as to reach Paris three weeks before 1st April, 1889, in due course of mail.

GEORGE D. BROOKES.

Sworn to and subscribed before me this 29th day of March, 1889.

SAM'L. C. MILLS,
Notary Public. [L. S.]

Supreme Court of the United States:

OCTOBER TERM, 1889.

Error to the Supreme Court of California.

HENRY M. HALE, *et al.*, *Executors*, *Plffs. in Error*,
vs.
STEPHEN AKERS, *et al.*, *Defts. in Error.*
No. 270.

BRIEF OF DEFENDANTS IN ERROR.

FRANK W. HACKETT,
For Defts.

R. O. Polkinhorn, Printer, 632 & 634 D Street, N. W.

Supreme Court of the United States:

OCTOBER TERM, 1889.

HENRY M. HALE, *et al.*, *Executors*, *Plffs. in Error*,
vs.
STEPHEN AKERS, *et al.*, *Defts. in Error.*
} No. 270.

Defendants' Brief.

This is a writ of error to the Supreme Court of California, in an action of ejectment. Suit was brought in the district court of Sonoma county, California, by the executors of the will of Theodore L. Schell, of San Francisco, who died in that city 15 December, 1877. Upon a trial, 26 August, 1880, before the court without a jury, judgment was had for the defendant. This judgment the Supreme Court of the State affirmed 26 March, 1886. The district court filed certain findings of facts, which are printed in the record, (pp. 6–13) and upon which the follow- brief statement is founded:

Statement of Facts.

The land in controversy is about fifteen acres in extent, and a part of a large tract of 423 acres, in Sonoma county. The plaintiffs in error have filed no map or plan in the record; and it may not be

easy to understand how the boundaries of the tract lie, should they become material to the disposition of the case. We may say, however, in a rough way, that the tract is of a triangular shape, the side toward the east being the Arroyo Seco. The southern line of the triangle is from the point where the Arroyo Seco enters the salt marsh, and runs southwesterly to Sonoma creek, at a point called the "Trancas." The upper or northern line is from a point up the Arroyo Seco, at the Huichica Hills, and runs southwesterly to the Sonoma creek at "Trancas." The dispute is as to the true location of this Trancas line. If the upper line is the correct one the 423 acre tract is embraced in the Huichica patent; if the lower, it belongs to the pueblo lands of Sonoma.

The history of these patents is briefly, as follows:

On the 24th June, 1835, the Mexican governor of California instructed Gen. Vallejo to establish the pueblo of Sonoma. Gen. Vallejo established the pueblo that year, and surveyed its boundaries. He laid out the tract into lots and blocks, under the direction of the governor, and established families thereon, who occupied the tract along the Arroyo Seco down to the point where it entered the salt marsh. This action he duly reported to the Mexican governor, who approved it. (Rec. 9.)

The boundaries of the pueblo tract were, "on the east the Arroyo Seco, from the vineyard of Salvador Vallejo to the salt marsh on the bay; thence along the salt marsh westerly to Sonoma creek; thence up said creek to the Agua Caliente creek; thence easterly by the hills north of the city to place of beginning." (Rec. 9, 14th Finding of Fact.)

On the 28th October, 1841, another Mexican governor made a grant to one Jacob P. Leese, of the ranch called "Huichica," embracing all the land between the Arroyo Seco, the Arroyo de los Carneros and the swamp land, containing two square leagues. This tract lay to the east of the pueblo grant, the Arroyo Seco being its western boundary. (Rec. 6.)

This grant was unsatisfactory to Leese as containing only two leagues, whereas he wanted four leagues; and he claimed that the diseno, or map, was defective. On 15 June, 1844, Leese presented another petition, and on 6th July following, the Mexican governor Micheltoreno made him a second grant of three and a half leagues. It was bounded on the north by the crossing of the upper road to Napa, on the east by the Arroyo de los Carneros, on the south by the swamp lands on the bay, on the west by Estero de Sonoma as far as the Trancas, taking the direction of the Arroyo Seco as far as the Little Hills of Huichica. This grant was made subject to approval by the departmental assembly. The assembly approved the first grant, September, 1845, (more than a year after the second grant was made); but the second grant was never placed before them for approval. (Rec. 7.)

Leese presented a claim for the whole tract of five and a half leagues to the board of land commissioners, under the Act of 1851, who confirmed his title April 18, 1853. The district court confirmed it, April 22, 1856. The decree of confirmation named the boundaries: "On the north by the upper road which goes to Napa, on the east by the Arroyo de los Carneros, on the south by the marsh land, adjoining the bay of San Francisco, and on the west by

the Estero of Sonoma as far as the Trancas, taking the direction of the Arroyo Seco." (Rec. 8.)

Under this decree a survey was approved by the U. S. surveyor general for California June 4, 1859. No notice of the survey, and its approval, was given; and no officer of Sonoma had notice of the proceedings relative to the approval. (Rec. 8.)

A patent for the Huichica ranch, of 18,704 acres, was issued by the United States to Leese August 3d, 1859, in the usual form of patents issued on confirmed Mexican grants, reciting the second grant, confirmation of the courts and survey.

The westerly boundary, as shown on the plat in the patent, is Sonoma creek (Estero of Sonoma). At the Trancas a straight line runs north, 37 degrees east, 156 chains to the Arroyo Seco at the Huichica Hills. This is the upper, or northern, location of the Trancas line, and forms what the plaintiffs contend is the northern boundary of the pueblo of Sonoma. (Rec. 8.)

By mesne conveyance from Leese—Schell, before the patent issued, became the owner of the piece of land that forms the subject of this suit.

On the other hand, the authorities of the city of Sonoma, on 21 May, 1852, presented their claims, as successors of the pueblo, to the land commissioners, who confirmed it January 22, 1856. An appeal was taken to the United States district court, but transferred to the circuit court, which latter court, November 2, 1864, confirmed the city's title. The decree fixed the Arroyo Seco, from the vineyard to the salt marsh, as the southeast boundary of the pueblo.

The surveyor general surveyed the land in 1868, and on 14th August, 1872, reported the survey to

the land department of the U. S. for approval. Due notice was given, according to Act of 1 July, 1864, (13 Stat. 332,) and after a hearing the commissioner of the general land office, 8 March, 1876, decided upon the location of the Trancas line, on a conflict arising before him, on the approval of the survey. The commissioner adjudged that the boundary should be as follows: "A direct line running from the point marked Trancas, on Sonoma creek, to the point where the Arroyo Seco enters the salt marsh (station No. 43 in the amended survey of rancho Huichica) and thence following the direction of the Arroyo Seco to the Little Huichica Hills." The commissioner decided that this line should constitute the southeasterly boundary of the pueblo of Sonoma. (Rec. 10.)

Upon this the surveyor general made an amended survey, after due notice; and the whole subject being returned to the commissioner, a hearing was had, after due published notice, on the resurvey and the objections thereto. The commissioner approved the resurvey and the former decision. No appeal was taken, and the decision became final.

A patent was issued by the United States to the authorities of Sonoma 31st March, 1880, for the said pueblo land, containing 6063.95 acres. The patent covered the triangular piece of 423 acres, above-mentioned.

The defendant, Stephen Akers, entered into possession of the land in suit in 1856, under a contract with the city of Sonoma; and he has remained in possession, cultivating and improving it, ever since. In May, 1858, the city of Sonoma conveyed this land to him, with enough more to make 111 acres, it all

being within the city limits, as surveyed and patented. (Rec. 11.)

On 12th September, 1860, Schell began a suit in the district court of Sonoma county against Akers, to recover possession of the 111 acres. He claimed title under the Huichica patent; while Akers, by his answer, claimed title and possession under his deed from the city of Sonoma. This suit raised the question whether the premises in controversy were within the boundary of the Huichica patent, and belonged to Schell (the grantee of Leese); as within the pueblo confirmed to the city of Sonoma.

At this juncture, while Sonoma was asserting her right in the courts, Akers and Schell entered into a written agreement 11 October, 1860, (Rec., 4, 5). They divided the 111 acres equally. Akers released to Schell the eastern half, and kept to himself the western half. In consideration of this Schell covenants and agrees that in the event the city of Sonoma establishes her claim to any part or portion of the above released tract of land, he will deliver the possession of the same, or such portions thereof as may be so established, together with a yearly rent from this date of $5 per acre for the land so to be delivered. And the said Akers hereby covenants and agrees, "that in the event of the city of Sonoma not being able to establish her claim beyond the present line of the Huichica patent, that he will deliver possession to the said Schell of all or such portion of the remainder of said above described tract of land, as may be within the line of said Huichica patent, and will pay a yearly rent for the same, at the rate of $5 per acre to the said Schell."

This instrument, duly acknowledged, was on 12 October, 1860, recorded in the county records (Rec. 5). That same day Schell dismissed his action. The parties built a fence to mark the division of the 111 acre tract into two fields, nearly equal.

The superior court decided that "this contract of 11 October, 1860, was conclusive of the controversy. The Huichica patent had issued when that agreement was made and covered the land in dispute. Plaintiffs' testator had then all the title which he ever could acquire. The parties must have referred to the final location of the patent of the pueblo of Sonoma, when they in their agreement used the phrase 'in the event the city of Sonoma establishes her claim to any portion' of said land. That patent has been finally located and embraces the land which is the subject of this suit. It follows that the defendant should prevail." (Rec. 5, 6.) Judgment for defendants for costs. (Rec. 13).

Upon appeal, the supreme court of California affirmed the judgment of the superior court. (Rec. 15.)

Points of Law.

This Court has no jurisdiction.

The opinion of the supreme court of California has been printed in the record (pp. 15–20). This court will look at it to see upon what grounds the decision was made. *McManus* vs. *O'Sullivan*, 91 U. S. 578. The court will also, if it is needful, make an analysis of the case to discover whether an alleged federal question, that the state court has passed upon, was necessary to the judgment. *De Saussure* vs. *Gaillard*, 127 U. S. 232.

Both the superior court of Sonoma county and the supreme court of the state of California, have decided that the agreement of October 11, 1860, bound Schell to abide by the result of the proceedings that the city of Sonoma was then taking in the courts to establish her right to the land in question. The construction of this agreement involved no federal question. It was purely a question of general law, and the decision of the state court thereon is conclusive.

This question in its terms controls the whole subject. This court will not enquire whether the state court is right or wrong in deciding that the agreement had taken away the plaintiffs' right to maintain the action. It is enough that the state court has said that such is its legal effect.

The plaintiff's fourth assignment of error is :

"Said court erred in adjudging that plaintiffs' testator, Schell, and the defendant Akers, in executing their written agreement, dated October 11th, 1860, contemplated or intended that in case any patent should be thereafter issued to the city of Sonoma conveying any portion of the land to which Schell then had title under the Huichica patent aforesaid, dated August 3, 1859, such subsequently issued patent would or could divest said Schell of his title to said land under said Huichica patent, or could establish that the superior title to said land was vested in the city of Sonoma." (Rec. 21.)

This is clearly an admission by the plaintiffs in error that the supreme court of California has decided that title had been divested by virtue of a written agreement, the construction of which involved no federal question whatever, a ground of decision so broad as to dispose of the whole case. This court

has said that if a federal question has "been erroneously decided against plaintiff in error, then this court must further enquire whether there is any other matter or issue adjudged by the state court, which is sufficiently broad to maintain the judgment of that court, notwithstanding the error in deciding the issue raised by the federal question. If this is found to be the case, the judgment must be affirmed without enquiring into the soundness of the decision on such other matter or issue." Per Mr. Justice MILLER, *Murdock* vs. *Memphis*, 20 Wall., 636.

Jenkins vs. *Loewenthal*, 110 U. S. 222, is in point. Suit by assignee of bankrupt to recover lands conveyed by the bankrupt, the ground of suit being that the conveyances though absolute on their face, were intended as mortgages. The defences were (1) that defendants were innocent purchasers for valuable consideration without notice; and (2) bar of limitation under bankrupt law, the latter being a federal question. The court below sustained both defences. As the finding by the court below that defendants were innocent purchasers for value, says WAITE, C. J., "is broad enough to maintain the decree, even though the federal question involved in the other defence was decided wrong, we affirm the decree, without considering that question, or expressing any opinion on it. *Murdock* vs. *Memphis* sustains this practice."

Says Mr. Justice MATTHEWS, in *De Saussure* vs. *Gaillard*, 127 U. S. 232:

"It has been repeatedly decided under § 709 of the revised statutes, that to give this court jurisdiction of a writ of error to a state court, it must appear affirmatively, not only that a federal question was presented for decision to the highest court of the

state having jurisdiction, but that its decision was necessary to the determination of the cause, and that it was actually decided, or that the judgment as rendered could not have been given without deciding it." *Brown* vs. *Atwell*, 92 U. S. 327; *Citizens Bank* vs. *Board of Liquidation*, 98 U. S. 140; *Chouteau* vs. *Gilson*, 111 U. S. 200.; *Adams County* vs. *Burlington & Missouri Railroad*, 112 U. S. 123; *Detroit City Railway* vs. *Gathard*, 114 U. S. 133; *New Orleans Water Works Co.* vs. *Louisana Sugar Refining Co.*, 125 U. S. 18."

It cannot be disputed that the supreme court of California has put its decision at least as much on the ground that the agreement of October 11, 1860, prevented plaintiffs from recovering, as on the ground that the Sonoma patent was rightly located. The court says there are "two sufficient answers" to the claims made by the appellants. One of these is the legal effect of the agreement. Hence obviously it was not necessary to the judgment that the language "taking the direction of the Arroyo Seco," should be construed as it was; or, indeed, construed at all.

In this aspect of the case, it does not help the plaintiffs, even if the supreme court of California were palpably wrong in its conclusions as to the meaning of the Huichica grant.

In view, of the fact, therefore, that the state court disposed of this suit below upon a ground that controlled the entire subject, and did not involve a federal question, we have not thought it necessary to follow the brief of the plaintiffs in discussing the federal question itself. We will content ourselves with a few observations. Supposing, for the sake of argument, that the court should take jurisdiction, we respectfully submit there is no error.

The plaintiffs seem to think that the Mexican government, after granting pueblo lands to Sonoma and approving their location in 1835, deliberately granted 423 acres of that tract, in 1844, to Leese. Upon this assumption, they contend that the governor was properly exercising a right in thus curtailing the extent of the pueblo grants.

We deny that the Mexican government intended to encroach on the pueblo lands; on the contrary, our view of the case is that it studiously avoided so doing. The location of the Trancas line approved by the commissioner of the land office, upon full hearing, and afterwards by the California court, sustains this view.

It is to be remembered that the grant to Leese must have been a gratuity. Says Mr. Justice MILLER, speaking of the magnificent style in which the Mexican government granted lands in California: "When an application was made to the government for a grant, which was always a gratuity, the only question was whether the locality asked for was vacant, and was public property." *Rodrigues* vs. *United States*, 1 Wall. 537. There can be no presumption that the Mexican government would in this grant to Leese (already much larger than the pueblo grant) cut off four hundred or more acres from the pueblo, and give them to Leese. Certainly there ought to be positive proof offered before such intent could be treated as established.

The authorities cited by the plaintiffs go no further than to support the doctrine that the Mexican government after granting pueblo lands continued in some instances to exercise the right of granting house or garden lots to private individuals within the limits

of a pueblo grant. This we readily admit. Indeed the policy of Mexico with regard to pueblos effectually disposes of all such theories as the plaintiffs are forced to construct in order to support their claim that the governor in 1844 intended the Trancas line to cut off a part of the pueblo tract, for the purpose of handing it over as a present to Leese.

In the well known case of *Hart* vs. *Bennett*, 15 Cal. 549, cited by plaintiffs, the court says:

"If governors of California have granted lands within the general limits of pueblos, it will be presumed, unless the contrary be known, that such grants were made in accordance with the objects and uses for which such lands had been assigned and dedicated by the laws to the pueblos."

* * * "So far as we have examined the grants made by the different governors within pueblo limits they seem to have been in conformity with such general object of building up a town by encouraging settlement and cultivation, and with the uses to which such lands had been dedicated. If the tract granted was of a larger size than that usually given for a building lot or for gardening purposes, the governor first consulted the ayuntamiento or alcade, to ascertain whether there was any objection to the grant, or sent the grant to them for action prior to its being delivered to the grantee. Moreover the tracts so granted were usually at a considerable distance from the principal settlement or upon the very outskirts of the pueblo lands, and a special clause was generally introduced, making the lands so granted subject to the regulations and tax or *canon* of the respective pueblo."

The whole scope of the federal question is, what did the words "taking the direction of the Arroyo Seco," mean?

If this language is ambiguous, then to that extent the western boundary of the second Huichica grant

is to be treated as uncertain, or "floating." The pueblo grant, on the contrary, is within natural and well-defined boundaries. Here then we may confidently appeal to the underlying principle of *Henshaw* vs. *Bissell*, 18 Wall. 255, as recognized in *Miller* vs. *Dale*, 92 U. S. 473. A grant of land identified by specified boundaries, or having such descriptive features as to render its identification a matter of absolute certainty, gives a better right to the premises than a floating grant, although such floating grant be first surveyed and patented.

Moreover, where a survey and a patent thereon are founded upon a superior Mexican grant, the rights of a party thereunder are not concluded by a prior survey to other claimants. *Adam* vs. *Norris*, 103 U. S. 591. In this case the plaintiffs in ejectment claimed that an approved survey under the act of June 14, 1860, (12 Stat. 33) was, according to the fifth section of that act, of the same effect and validity as a patent: that their survey was approved in 1861, while that of the defendant was not approved till 1867, although the defendant's patent was issued in 1870, and plaintiff's in 1873. The court, upon the ground that a patent to parties claiming under Mexican grants is in the nature only of a quit-claim by the United States, decided that the priority of the grant from the Mexican government governs.

The pueblo grant in 1835 controls the location of the Trancas line, unless the later grant of 1844 is in such terms as to preclude the possibility of the line being run so as to conform to both grants.

But a complete answer to the plaintiffs' claim is that the location of the Trancas line was the subject of two hearings before the general land office, where

a conflict arising, due notice was given, argument of counsel heard, and the boundary was established So satisfactory did this appear that no appeal was taken to the Secretary of the Interior. (Rec. 10.) Indeed, the brief of the plaintiffs' fails to adduce any ground of error in the decision that "taking the direction of the Arroyo Seco," meant that the line was to run from the Trancas to the nearest point on the Arroyo Seco, and thence up that creek. It can mean nothing else.

We respectfully submit that there is no jurisdiction; and that even if there be jurisdiction, it is clear that there was no error in the rendition of the judgment by the state court. We ask that the judgment be affirmed, with costs.

FRANK W. HACKETT,
For Defts. in Error.